

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D. C. 20036

(202) 955-9600

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FACSIMILE

(202) 955-9792

May 7, 1999

ROBERT J. AAMOTH

DIRECT LINE (202) 955-9676

E-MAIL: raamoth@kelleydrye.com

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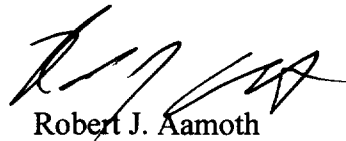
Ms. Magalie Roman Salas  
Office of the Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, N.W.  
Washington, D.C. 20554

*Re: Ex Parte Submission in CC Docket No. 98-121*

Dear Ms. Salas:

I have attached an *ex parte* submission by the Competitive Telecommunications Association in the above-referenced proceeding in response to a proposal by BellSouth in this proceeding on April 8, 1999. Please direct any inquiries to the undersigned attorney.

Respectfully submitted,

  
Robert J. Aamoth

cc w/ att: Lawrence E. Strickling  
Michael Pryor  
Claudia R. Pabo

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**Ex Parte Submission of the Competitive Telecommunications Association  
on BellSouth's Proposal for Self-Effectuating Enforcement Measures  
CC Docket No. 98-121**

In response to a request by the Common Carrier Bureau, the Competitive Telecommunications Association's ("CompTel") prepared this submission in response to the document entitled "BellSouth's Proposal for Self-Effectuating Enforcement Measures." Due to time constraints, and because CompTel has circulated the BellSouth proposal to its member companies for review and analysis, this response should be viewed as preliminary in nature.

In general, CompTel believes that self-effectuating enforcement measures are a critical aspect of a Regional Bell Operating Company's ("RBOC") efforts to open its local markets fully and irreversibly to competitive entry.<sup>1</sup> On numerous occasions, CompTel has submitted its views on performance measurements and penalties for failure to comply with the 1996 Act's parity standard. While BellSouth's instant proposal largely ignores the progress already made by the Commission and State regulators in this arena, CompTel is pleased that BellSouth finally has acknowledged that the public interest requires performance measures and self-executing remedies to ensure BellSouth's full compliance with the Act's -- and the Commission's -- market-opening requirements. Self-effectuating penalties must be designed to establish an incentive for the RBOCs to comply and to resist backsliding. To be meaningful, self-effectuating enforcement measures must be predictable, immediate and rigorous. Otherwise, it will be impossible for the Commission to ensure that the RBOCs do not backslide on compliance once they have obtained approval under Section 271 to enter the in-region interLATA market in a state.

CompTel is pleased to continue its work in this arena and desires to work collaboratively with the Commission, State regulators, BellSouth and other RBOCs to arrive at comprehensive measurements and meaningful penalties -- both of which are lacking in BellSouth's instant proposal. The following preliminary remarks track BellSouth's proposal on a section-by-section basis. CompTel looks forward to discussing with the Commission this preliminary response to BellSouth's proposal.

**BellSouth's Introduction/Executive Summary**

BellSouth characterizes its Self-Effectuating Enforcement Measurements proposal as voluntary, asserting that neither the FCC nor the states have authority to impose self-executing penalties or liquidated damages provisions. However, compliance with the 1996 Act and the Commission's rules is not voluntary, and the FCC and its state

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<sup>1</sup> Although these comments focus on RBOCs, the Commission also should consider whether to adopt identical or similar measures for other incumbent local exchange carriers.

counterparts have ample rulemaking and enforcement authority to impose such provisions. In its *Second Louisiana 271* decision, the Commission already decided that the public interest requires self-effectuating enforcement mechanisms. Particularly in light of the dismal performance of the RBOCs (e.g., Bell Atlantic) in meeting FCC-imposed merger conditions, the Commission should adopt a skeptical viewpoint towards any RBOC proposals for voluntary conditions as the price for significant regulatory relief.

Moreover, the statewide – and, in some cases, region-wide -- measurements proposed by BellSouth must be rigorously disaggregated. Statewide reporting can mask discriminatory provisioning in particular markets where BellSouth faces the most serious competition.

In addition, BellSouth's proposed remedies will not make CLECs whole. Merely crediting charges for missed performance is not enough to repair damage done to CLECs, nor does it give BellSouth sufficient incentive to perform. The Commission must establish specific monetary amounts in light of the harm that non-compliance will inflict upon CLECs as well as the need for rigorous penalties to give RBOCs the incentive to perform satisfactorily. As proposed, BellSouth easily could absorb its proposed remedies as the cost of keeping competitors out of its markets, much like a trucking company might be willing to pay nominal fines for overweight trucks in light of the profits it would earn from violating weight restrictions. Remedies should prevent backsliding, not excuse it.

In addition, the Commission should make clear that all remedies will be effectuated immediately and automatically, regardless whether the RBOC seeks to challenge the measurement. In cases where the RBOCs litigate to prevent implementation of a self-effectuating remedy, they must be made to pay some penalty (e.g., attorneys' fees, or higher monetary amount) in order to prevent them from defeating this system through the trench warfare of prolonged litigation.

Also, the FCC should adopt a requirement for an independent audit of BellSouth's reporting performance at BellSouth's expense. Such an audit should be made publicly available to all interested carriers, and there should be self-effectuating penalties for reporting inaccuracies.

BellSouth also ignores the need for escalating penalties depending upon the severity, magnitude and number of violations. CompTel submits that the Commission should consider a range of possible remedies for repeated violations or a pattern of violations, such as, for example, suspending the RBOC's Section 271 authority so that it may not provide interLATA service to new customers or otherwise market any offerings that include interLATA services during the suspension period. The Commission also should consider the need for more serious penalties, such as, for example, revoking Section 271 authority in cases where the RBOC's conduct has resulted in the market not being irreversibly open to competitive entry.

## **BellSouth's Benchmarks**

BellSouth's proposal suffers from far too much aggregation. BellSouth proposes to aggregate residential, business and designed services. Unless measurements are made and separately reported for each of these categories, BellSouth could easily mask discriminatory provisioning, and neither the Commission nor competitors will be able to gauge BellSouth's compliance with the Act. Further, loop/port combinations should be included in a separate category since such combinations are not the equivalent of resale.

Also, CompTel believes that reporting and measurements should be performed on a monthly basis, and that the Commission should consider establishing self-effectuating remedies that would apply to an RBOC's failure to perform in compliance with the statute and the FCC's rules for a specific CLEC. Even where an RBOC's performance on an industry-wide basis does not result in self-effectuating remedies, there should be performance measurements and self-effectuating remedies to protect individual CLECs from being singled out for adverse treatment.

## **BellSouth's Further Conditions**

BellSouth's first condition – that “[n]o enforcement mechanism will be put in place until BST receives 271 approval from the FCC for a given state” -- ignores what the Commission already decided in its *Second Louisiana Section 271* decision. Pursuant to that decision, BellSouth cannot receive Section 271 approval before it has a system of self-effectuating enforcement mechanisms in place. Further, these mechanisms should be in place for a sufficient period of time -- *prior to Section 271 approval* -- so that the industry and regulators can gauge their performance and effectiveness.

While CompTel does not disagree with BellSouth's second condition – that “[t]he penalties are structured to provide no incentive for the CLEC to prefer the remedy over the quality of service” – the flipside of this also must be included. That is, the penalties should be structured so that they provide BellSouth with a meaningful performance and compliance incentive and should not be so weak that they could be readily borne as a “cost of doing business”.

BellSouth's third condition – that “[a] finding (statistical or materiality) of apparent disparity is not an irreversible finding of discrimination” – should be modified to provide that such a finding establishes a *prima facie* case of an unreasonable practice in violation of the Communications Act. Further, the Commission should confirm that CLECs are free to bring lawsuits, either before the Commission or in another forum, to obtain damages for unlawful conduct by BellSouth above and beyond what the CLECs might receive through self-effectuating enforcement remedies.

## **BellSouth's Remedies**

BellSouth is flatly wrong in its assertion that its proposed remedies will make CLECs whole. Crediting charges for missed performance (and BellSouth does not even propose to go that far) is not enough to repair damage done to the CLECs' business plans, nor does it give BellSouth sufficient incentive to perform in compliance with its statutory and regulatory obligations. As proposed, BellSouth easily could anticipate absorbing these remedies as a cost of doing business.

## **Implementation**

BellSouth's implementation proposal is confusing. In the first sentence, BellSouth appears to suggest that it unilaterally can alter existing agreements. Obviously, this is not the case. Moreover, some CLECs may have certain terms in their agreements which should not be replaced automatically by BellSouth.

In the second sentence, BellSouth states that "enforcement measures will be structured so that any CLEC can selectively add these provisions to its contract using the 'pick and choose' mechanism." Although, this statement reveals BellSouth's view that it, rather than the FCC, has the authority to interpret Section 252(i), CompTel agrees with the principle that BellSouth's self-effectuating enforcement measures should be made available to all CLECs, at their request. BellSouth appears to have confused a contract amendment issue, with an opt-in issue (which it has better chance of gaming).

## **Attachments -- "VSEEM Matrices" and Notes**

CompTel notes that each of the matrices suffers from at least two common deficiencies: aggregation of residential and business at the state (or regional) level; and lack of a meaningful remedy/compliance incentive. Moreover, the terms of the proposed measurements and the penalty calculations are often vague and confusing. Once again, CompTel emphasizes that the set of measurements and penalties proposed by BellSouth is not comprehensive enough to measure parity, to guard against discrimination, to encourage compliance, or to protect against backsliding, once Section 271 approval is granted. Below CompTel makes preliminary remarks that are limited to the matrices submitted by BellSouth.

- **Installation/Timeliness.** While this measurement may be useful, it is no substitute for comparing provisioning intervals. Retail and wholesale due dates are controlled by BellSouth. BellSouth easily could assign retail dates based on shorter provisioning intervals. Yet, the proposed measurement would not detect such discriminatory conduct. It also is problematic that BellSouth does not appear to be willing to bring any UNEs other than loops into its proposed framework of self-effectuating enforcement measures. Finally, the parameters of the "for BST caused reasons" qualifier must be fleshed-out.

- **Installation/Quality.** BellSouth's proposed retail analog -- retail due date missed -- is inadequate. The appropriate retail analog should be the percentage of retail trouble reports, and the Commission should consider a longer measurement period, such as 10 days. BellSouth's proposal also is flawed in the following respects: it is limited to loops; it includes no escalation in penalties for repeated problems; and the proposed penalty is extremely weak and is not likely to encourage performance that allows competitors to compete in a meaningful way.
- **Maintenance/Repair Timeliness.** Again, while this measurement may be useful, it is no substitute for comparing actual repair intervals. BellSouth's proposed retail analog -- retail due date missed -- is inadequate. The Commission should consider more accurate measurements, such as, for example, the percentage of missed appointments. BellSouth's proposal also is inadequate because it fails to measure repair timeliness for UNEs other than loops; it includes no escalation in penalties for repeated reports; and proposed penalty is extremely weak.
- **Maintenance/Repair Quality.** In the matrix and note for this measurement, BellSouth erroneously suggests two analogs. The percentage of repeat reports is the appropriate analog. Once again, however, BellSouth's limited proposal is inadequate because it fails to measure repair timeliness for UNEs other than loops; it includes no escalation in penalties for repeated reports; and proposed penalty is extremely weak.
- **Billing/Data Timeliness.** Again, BellSouth creates confusion by indicating that there is a retail analog, but fails to explain what the analog is. BellSouth's proposal also suffers the following deficiencies: aggregation at the regional level, rather than a more disaggregated level; the penalty does not apply to a material failure in the first instance; and the penalties do not increase for greater/longer failures.
- **Billing/Invoice Timeliness.** Here, too, BellSouth fails to explain the retail analog and benchmarks it seeks to incorporate into its standard. Additional problems with BellSouth's proposal include: aggregation at the regional level; and the lack of an explanation for the 0.00043 figure used in the penalty calculation.
- **OSS.** While BellSouth's proposed measure is important, it cannot replace measurements that capture OSS accuracy and flow through rates.
- **Collocation.** While it is useful to measure due dates missed, this measure is meaningless without BellSouth agreeing to reasonable and standardized intervals. Other problems with BellSouth's proposal include: the penalty only applies when the due date is missed by a full week; it includes no escalation in penalties for greater/longer violations; it fails to explain adequately the calculation of the proposed penalty.

- **Trunking.** BellSouth's proposal is too limited to be effective. If BellSouth fails to proved trunking within the material variance parameter set, all CLEC payments due BellSouth for local traffic termination should be waived for the month in which the violation occurred.

May 7, 1999